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**MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
HEARINGS UNIT**

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**BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
STATE OF MONTANA**

KATRIN R. CHANDLER, BETTY J.)	STATEMENT OF POSITION
LANNEN, POLLY REX, JOSEPH MILLER)	OF THE MONTANA
and THE CLARK FORK COALITION)	DEPARTMENT OF FISH,
Petitioners)	WILDLIFE AND PARKS

INTRODUCTION

Petitioners Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and the Clark Fork Coalition (hereinafter "Petitioners") submitted a petition for declaratory ruling and request to amend the Department of Natural Resources and Conservation's (hereinafter "DNRC") definition of combined appropriation contained in Rule 36.12.101(13), Admin. Rules of Mont. ("ARM"). Petitioners brought this action pursuant to §§ 2-4-501, and 2-4-315 MCA and Rules 1.3.227 and 1.3.308 ARM. DNRC accepted the Petition for consideration on January 28, 2010 and by Order dated March 9, 2010 announced that all parties interested in participating in the Petition may file briefs or statements of position with DNRC by April 30, 2010. The Montana Department of Fish, Wildlife and Parks (hereinafter "FWP") hereby submits this Statement of Position in the above-captioned matter.

Briefing and Statements of Position are limited to whether the 'combined appropriation' administrative rule definition is consistent with applicable law under the Montana Water Use Act. It is FWP's position that the 'combined appropriation' administrative rule definition (Rule

36.12.101(13) ARM) is NOT consistent with applicable law under the Montana Water Use Act, Section 85-2-101 *et.seq*, MCA.

BACKGROUND

I. Statement of Interest.

FWP is an agency of the State of Montana. It is FWP's responsibility to supervise all the wildlife, fish, and game of the State of Montana, and it has the exclusive power to spend for their protection, preservation and management. Section 87-1-201(1), MCA. FWP is also a major water right holder, with a total of 106 "Murphy Right" fishery claims on twelve Montana streams and instream flow reservations on 372 stream segments in the Yellowstone, Missouri and Lower Missouri drainages.

FWP has participated in many new water right permit application contested cases in which facts have shown that unmitigated groundwater development would have an adverse affect on FWP's instream surface water rights and reservations. FWP believes that exempt wells have the same potential for adverse affect to FWP's instream water rights as permitted wells and that the consumptive use of water from exempt wells does diminish surface flow. FWP further believes that multiple exempt wells have a cumulative effect on surface water resources.

II. Exempt Wells and Combined Appropriations.

Sec. 85-2-306(3)(a), MCA states, "a combined appropriation from the same source from two or more wells or developed springs exceeding [the 35 gpm/10 ac-ft-yr] limitation requires a permit." Prior to amendment of 36.12.101(13) ARM, the term "combined appropriation" was defined as "an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in [DNRC's] judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation. . . ." Now, "Combined appropriation" is simply defined as "an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system." 36.12.101(13) ARM. FWP's position is that the current definition is too narrow because it allows exempt well development that complies with the rule but violates the statute.

ARGUMENT

In accordance with DNRC's March 9, 2010 Order, FWP will limit its argument to the following issue:

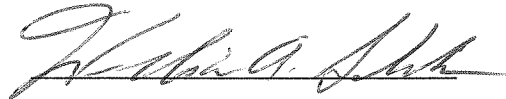
Whether the 'combined appropriation' administrative rule definition (Rule 36.12.101(13) ARM) is consistent with applicable law under the Montana Water Use Act, Section 85-2-101 *et.seq.*, MCA.

The combined appropriation administrative rule definition is not consistent with applicable law because an appropriator can comply with the administrative rule, and not comply with the statute. This can be illustrated with an example: Under the current rule, an individual who wishes to irrigate 20 acres of hay may do so with exempt wells that are not manifold into the same irrigation system; i.e., there are no pipes connecting one well to another. However, assuming an irrigation demand of 2 a.f./acre, the total demand will be 40 a.f. The appropriator may complete four wells in the same source aquifer and four independent irrigation systems to provide full service irrigation to 20 acres of hay. The appropriator is the same, and the beneficial use is the same. Though the appropriator would not be in violation of the definition of combined appropriation, his action would not be consistent with the Water Use Act which states that a combined appropriation from the same source that exceeds 10 acre-feet a year requires a permit. It not only defies logic to conclude otherwise, but is inconsistent with the plain meaning of the statute.

The foregoing example is hypothetical but is useful for purposes of illustration. Unfortunately, the scenario is common in the real world. Attached to this Statement of Position is a Department of Environmental Quality Certificate of Subdivision Plat Approval for Pioneer Crossing and Centennial Village Subdivision (E.Q. #10-1634). There, the Department of Environmental Quality (DEQ) approved the subdivision with temporary individual water supply systems or temporary shared water supply systems. The subdivision will not be connected to the Town of Manhattan's public water supply system until the subdivision has received water rights from DNRC. Instead the developer will install individual wells for individual homes or groups of homes. There will be a total of five wells for individual residential lots. One hundred and

twenty seven lots, in small groups, will also be served by exempt wells. In addition, fourteen commercial lots will be served by individual wells. The total volume of water to be used is not disclosed, but it is obviously greater than 10 acre-feet. Each of the wells is to be drilled to a minimum depth of 25 feet. Clearly, they will be from the same source. But for the existing definition of “combined appropriation” in 36.12.101(13) ARM, the developer of Pioneer Crossing and Centennial Village Subdivision could not appropriate water under Sec. 85-2-306(3)(a). Yet, he will be able to build a major subdivision without permitted water rights. Over one hundred and thirty homes could be built and supplied with water by exempt wells with none of the Water Use Act’s protections for existing water users. This is not consistent with Sec. 85-2-306(3)(a), MCA where the law states, “a combined appropriation from the same source from two or more wells or developed springs exceeding [the 35 gpm/10 ac-ft-yr] limitation requires a permit.”

Respectfully submitted this 30 day of April, 2010 by:

A handwritten signature in cursive script, appearing to read "William A. Schenk", written in dark ink.

William A. Schenk

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY
CERTIFICATE OF SUBDIVISION PLAT APPROVAL
(Section 76-4-101 et seq., MCA)

TO: County Clerk and Recorder
Gallatin County
Bozeman, Montana

E.Q. #10-1634
10-26gal

THIS IS TO CERTIFY THAT the plans and supplemental information relating to the subdivision known as **Pioneer Crossing and Centennial Village Subdivision, Phase I, Rewrite:**

A tract of land being Tracts 1 and 2 of COS No. 1495G situated in the W1/2 of Section 3, Township 1 North, Range 3 East, Principal Meridian Montana, Gallatin County, Montana

consisting of one hundred sixteen (116) lots, one hundred ten (110) of which have been reviewed by personnel of the Permitting and Compliance Division, and,

THAT the documents and data required by ARM Title 17 Chapter 36 have been submitted and found to be in compliance therewith, and,

THAT the approval of the Plat is made with the understanding that the following conditions shall be met:

THAT this Certificate supersedes Certificate No. EQ#05-2564, dated November 7, 2006, and,

THAT the lots designated "Open Space A, B, C-1, D-1, E and F," are exempt from review under ARM 17.36.605(2)(a) which states: "*A parcel that has no existing facilities for water supply, wastewater disposal, and solid waste disposal, if no new facilities will be constructed on the parcel,*" and,

THAT the lot size as indicated on the Plat to be filed with the county clerk and recorder will not be further altered without approval, and,

THAT in **Pioneer Crossing**, Block 3, Lots 1-8; and, Block 4, Lots 5, 6 and 10-26 are approved for one(1) single family dwelling each, and,

THAT in **Pioneer Crossing**, Block 1, Lots 1-11; Block 2, Lots 1-15; Block 4, Lots 1-4 and 7-9; and, Block 19, Lots 1-11, are approved for one(1) single family dwelling and one(1) accessory dwelling above a detached garage each, and,

THAT in **Centennial Village**, Block 22, Lots 1-32, are approved for one(1) single family dwelling each, and,

THAT in **Centennial Village**, Block 23, Lots 9-15 are approved for one(1) unit of locally approved commercial development each, and,

CONDITIONAL WATER SUPPLY SYSTEMS

THAT each lot in Pioneer Crossing and Centennial Village is conditionally approved to be served by either a temporary individual water supply system or a temporary shared water supply system, and,

THAT when water rights are obtained for the Town of Manhattan's Public Water Supply System, each temporary well shall be disconnected and the lot shall connect to the Town of Manhattan's Public Water Supply System, and,

THAT to prevent a cross connection contamination situation with the public water supply system , physical connection between the temporary well and the residence or commercial business must be severed, and,

THAT the individual well must be abandoned or if the Town of Manhattan allows, the individual wells may be used as an irrigation well, and,

LOTS WITH INDIVIDUAL WELLS

THAT the individual water supply system for Block 1, Lot 1; Block 2, Lots 5, 6 and 15; and, Block 19, Lot 11 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

LOTS WITH SHARED WELLS

THAT the shared water systems for Block 1, Lots 2 and 3, Lots 4 and 5, Lots 6 and 7, Lots 8 and 9; and, Lots 10 and 11 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT the shared water systems for Block 2, Lots 1 and 2, Lots 3 and 4, Lots 7 and 8, Lots 9 and 10, Lots 11 and 12 (located on Lot 11); and, Lots 13 and 14, shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT the shared water systems for Block 3, Lots 1 and 8, Lots 2 and 7, Lots 3 and 6; and, Lots 4 and 5 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT the shared water systems for Block 4, Lots 1 and 2, Lots 3 and 4, Lots 5 and 6, Lots 7 and 8, Lots 9 and 10 (located on Lot 10) , Lots 11 and 24; Lots 12 and 21, Lots 13 and 20, Lots 14 and 19, Lots 15 and 16, Lots 17 and 18, Lots 22 and 23; and, Lots 25 and 26 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

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THAT the shared water systems for Block 19, Lots 1 and 2, Lots 3 and 4, Lots 5 and 6, Lots 7 and 8 (located on Lot 7); and, Lots 9 and 10 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT the shared water systems for Block 22, Lots 1 and 2, Lots 3 and 4, Lots 5 and 6, Lots 7 and 8; Lots 9 and 10, Lots 11 and 12, Lots 13 and 14, Lots 15 and 16, Lots 17 and 18; Lots 19 and 20, Lots 21 and 22, Lots 23 and 24, Lots 25 and 26, Lots 27 and 28; Lots 29 and 30; and, Lots 31 and 32 shall consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT a copy of the a draft shared users agreement will be filed with this approval, and,

COMMERCIAL LOTS WITH INDIVIDUAL WELLS

THAT the individual commercial water system for Block 23, Lots 9, 10, 11, 12, 13, 14 and 15 shall each consist of a new well drilled to a minimum depth of 25 feet constructed in accordance with the criteria established in Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM and the most current standards of the Department of Environmental Quality, and,

THAT the proposed use of Block 23, Lots 9, 10, 11, 12, 13, 14 and 15 shall not serve more than 24 persons for more than 60-days out of the year, otherwise, that water system becomes a public water system unto itself and plans and specifications for the water system must be submitted to Public Water Section for review and approval prior to the system being constructed, and,

THAT data provided indicates an acceptable water source at a depth of approximately 50 to 100-feet, and,

THAT no Public Water System connections to the Town of Manhattan's Public Water Supply System is approved until the Pioneer Crossing and Centennial Village Subdivision's Public Wells have received water rights from the DNRC, and,

THAT the public sewer systems serving all lots will be provided through extensions and service connections to the **Town of Manhattan's Public Wastewater Treatment System**, and,

THAT water supply and sewage treatment systems will be located as shown on the approved plans, and,

THAT the plans and specifications for any proposed sewage treatment systems will be reviewed and approved by the county health department and will comply with local regulations and ARM, Title 17, Chapter 36, Sub-Chapters 3 and 9, and,

THAT all sanitary facilities must be located as shown on the attached lot layout, and,

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THAT the developer and/or owner of record shall provide each purchaser of property with a copy of the plat, approved location of water supply and sewage treatment system as shown on the attached lot layout, and a copy of this document, and,

THAT instruments of transfer for this property shall contain reference to these conditions, and,

THAT departure from any criteria set forth in the approved plans and specifications and Title 17, Chapter 36, Sub-Chapters 1, 3, and 6 ARM when erecting a structure and appurtenant facilities in said subdivision without Department approval, is grounds for injunction by the Department of Environmental Quality.

YOU ARE REQUESTED to record this certificate by attaching it to the plat filed in your office as required by law.

DATED this 7th day of April, 2010.

Richard H Opper
Director

By:

Steve Kilbreath, Supervisor
Subdivision Review Section
Permitting and Compliance Division
Department of Environmental Quality

Owner's Name: Kenneth Vidar/Vidar Companies Inc.